

To: Water District 34 File

From: Jennifer Berkey

Re: Summary of issues related to watermaster's futile call request

Date: August 6, 2003

I have discussed the watermaster's futile call request and the proposals for distributing water for the remainder of the irrigation season with Bob Duke (watermaster), Seth Beal (advisory board chair), and Jay Jensen (advisory board member and one of the senior water right holders on the Moore canal).

Both Seth Beal and Jay Jensen had similar interpretations of the motion passed in the July 29, 2003 board meeting. They both expressed that the intent of the Management Plan is to leave enough water undiverted in the river, such that water flows past the Blaine canal to the Highway 93 bridge. The flow rate to be maintained in the river at the highway bridge is to be equal to the diversion rates of the water rights that are in priority, but are not deliverable. If those water rights total more than 20 cfs, then maintaining a flow of 20 cfs at the Highway 93 bridge would be acceptable. Mr. Jensen recognizes that this motion is different than a futile call, and stated that he proposed the Management Plan as an alternative to a futile call. Both board members stated that the watermaster was not instructed to further curtail junior water users as part the "reasonable attempt" to deliver the senior 1883 water rights. Both also expressed that the curtailment was not requested because the in-stream flows in the Management Plan were accepted as a concession.

The watermaster stated that he intends to attempt to maintain a flow of 20 cfs below the Beck Diversion, but does not intend to curtail junior water rights beyond 30 % of the May 20, 1884 in order to accomplish this.

I have the following comments and concerns regarding the pending futile call order:

1. The watermaster has requested a futile call. The advisory board has recommended following a management plan that basically delivers the senior downstream rights as an instream flow at a point upstream of their POD. I think this is a good plan, and I have not personally heard any opposition to it, but it is not really a futile call per se. Also, the advisory board has not requested a futile call (Tim, please verify this with their minutes – I think you have both of my copies now), they have requested implementation of the "management plan."
2. Although I have not heard any opposition to the management plan, the watermaster's interpretation is materially different than that of the advisory board members I spoke with. One of the board members suggested that the watermaster may be getting pressure from junior upstream water users to modify the plan in their favor.

3. Although the management plan may not be consistent with futile call doctrine, it should be noted that the watermaster has not attempted to deliver the downstream senior water rights in accordance with prior appropriation doctrine as he did not curtail 1884 rights in an attempt to deliver the 1883 rights on the Moore canal. My understanding from speaking with two of the advisory board members is that the Management Plan the board agreed on was intended to be a compromise between the downstream senior water users and the upstream junior water users.
4. I have rewritten the draft futile call order to reflect the advisory board's Management Plan. We may want to reconsider calling this a futile call order, but then I am not sure how we would address this?

To: Water District 34 File

From: Jennifer Berkey

Re: Conversation with Seth Beal regarding watermaster's futile call request

Date: August 6, 2003

Seth Beal returned my call on the afternoon of August 5, 2003. I told him that I would like his input to clarify the motion passed in the July 29, 2003 advisory board meeting and the advisory board's recommendations regarding the futile call request and the management plan to leave some water undiverted in the Big Lost River below the Beck diversion.

I asked Mr. Beal if the advisory board had provided any additional instructions to the watermaster regarding what actions the watermaster should take as part of the "reasonable attempt" to deliver water to the senior water rights on the Moore canal. Mr. Beal stated that, although he personally believes the watermaster should have curtailed all of the junior water rights for three days in an attempt to deliver the 1883 rights, the advisory board did not specifically instruct the watermaster to make these curtailments as part of the "test". Mr. Beal also stated that Jay Jensen, an advisory board member who owns some of the 1883 water rights on the Moore diversion, was willing to accept that the river had physically broken without further attempts to deliver his water, in concession for the management plan described in the motion passed during the July 29, 2003 meeting. Mr. Beal expressed his personal concerns that there are other water users with 1883 rights on the Moore diversion who are not on the advisory board. Mr. Beal does not personally feel that their right to make a call for water should be taken away, at least not without curtailing all of the junior rights for three days to demonstrate that the water cannot be delivered to them. However, Mr. Beal stated that the advisory board did not instruct the watermaster to curtail additional water rights beyond the priority cut date of 30 % of the May 20, 1884 rights.

I asked Mr. Beal to clarify the motion passed with regard to the amount of flow left undiverted in the river, the location of measurement, and potential curtailment of rights beyond 30 % of the May 20, 1884 rights in order to maintain flow in the river. Mr. Beal stated that his understanding of the motion was that the amount left in the river would be based on the priority dates and quantity of water rights below the Beck Diversion that are not being delivered. He also understood that the water would pass the Blaine Canal and that curtailment of rights beyond 30 % of the May 20, 1884 rights would occur if necessary to maintain an appropriate flow in the river below the Blaine Canal. Mr. Beal suggested speaking to Jay Jensen, who made the motion, to confirm this interpretation.

To: Water District 34 File

From: Jennifer Berkey

Date: July 30, 2003

Re: Futile Call Request

I spoke with Bob Duke this morning regarding Water District 34's request for the Director to make a futile call for the Big Lost River. According to Bob, the Advisory Committee had a meeting last night, which was attended by approximately 50 people, many of whom were from the area served by the Moore Diversion. At the meeting, the Advisory Committee agreed on the following management plan for delivering water after the river "breaks".

1. The Watermaster will continue to attempt to deliver decreed water rights in priority to the Moore diversion. Attempts to deliver water to the Moore diversion will be determined to be futile when no water has reached the Moore diversion for three consecutive days.
2. After this occurs, water will be re-allocated to water users on and above the Beck diversion using the reservoir inflow and Leslie gage readings. A minimum flow of 20 cfs (1,000 miner's inches) will be left in the Big Lost River below the Beck diversion.

Bob stated that there are no water users between the Beck and Moore diversions who will be adversely affected by the futile call. Water is not being diverted at the 3 in 1 ditch because the conveyance losses in the ditch are too high. There is one water user with rights in priority on the Lower Burnett ditch, but Bob says this user can receive water from the Beck ditch. The Watermaster's data verify that the 3 in 1 has not been used since July 21, and that the Lower Burnett has not been used this season. The B&J, which Bob did not mention, has not received water since June 23, 2003.

To: Water District 34 File

From: Jennifer Berkey

Re: Conversation with Jay Jensen regarding watermaster's futile call request

Date: August 6, 2003

Jay Jensen returned my call approximately 8:10 AM on August 6, 2003. I told him that I would like to visit with him to clarify the motion passed in the July 29, 2003 advisory board meeting and the advisory board's recommendations regarding the futile call request and the management plan to leave some water undiverted in the Big Lost River below the Beck diversion.

Mr. Jensen stated that he and his relatives own or lease 420 inches (8.4 cfs) of the 1883 water rights on the Moore canal. (There are a total 13.4 cfs of 1883 rights on the Moore, I have not verified the quantity owned or leased by the Jensens.) I asked Mr. Jensen if he was aware that the watermaster has continued to deliver water to 30 % of the May 20, 1884 water rights during what the watermaster is considering to be his 3-day attempt to deliver water to the Moore canal, and if Mr. Jensen was satisfied with the attempt. Mr. Jensen stated that he does not believe shutting off all of the junior water users between Mackay Dam and the Moore diversion would result in beneficial use of water for irrigation of the Jensens' land, and does not believe that the watermaster needs to curtail the junior users in order to prove that the 1883 water rights cannot be delivered.

Mr. Jensen clarified the intent of his motion, which was passed by a unanimous vote of the advisory board members present at the July 29, 2003 meeting, as follows. Further curtailment of junior water rights above the Leslie Bridge would not be required to demonstrate that water cannot be delivered to the senior rights on the Moore canal, in exchange for leaving a quantity of water equal to the undelivered senior water rights undiverted in the Big Lost River. In the meeting minutes this quantity is limited to a maximum of 1,000 to 1,200 miner's inches (20 to 24 cfs). Mr. Jensen stated that the intent was that 1,000 inches make it past the highway bridge below the Blaine Canal, so that the public would be able to see that some water had been left in the river. He said that this was discussed in the meeting and with the watermaster, and that the advisory board would like to see the watermaster leave more than 1,000 inches in the river below the Beck diversion if needed for the water to make it to the highway bridge.

I told Mr. Jensen that the watermaster's interpretation of the Management Plan is that water rights prior to 30 % of the May 20, 1884 will not be curtailed in order to leave some water flowing in the river below the Beck diversion. Mr. Jensen stated that the intent of the motion passed by the advisory board was that the amount left flowing in the river be based on the decree amounts and priority dates, and that further curtailment of junior water rights would occur if necessary to leave the corresponding amount of water flowing in the river at the highway bridge. Mr. Jensen commented that a number of people who attended the advisory board meeting were either downstream water users

whose rights had already been “off” for some time, or from the general public. Mr. Jensen also mentioned the concerns of domestic groundwater users in the lower valley who have experienced declining water levels. Mr. Jensen stated that the advisory board would like to leave some water in the river at the highway bridge so that it will be visible to the public.

Mr. Jensen also expressed that the advisory board discussed in the meeting that they would prefer to call these actions a “Management Plan” instead of a “Futile Call.”